No. 3755.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

J. W. WILLIS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA.

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STATEMENT OF THE CASE.

Plaintiff in error was accused in the District Court of the United States for the District of Montana, by information charging him with maintaining a common nuisance at Miles City, Montana, on the 19th day of March, 1921, said place being one where intoxicating liquor was kept and sold in violation of the National Prohibition Act (Trans. p. 1-3); to this information plaintiff in error entered a plea of not guilty (Trans. p. 4) and the case came on for trial before the court and a jury; after the evidence was received the court charged the jury and it retired to consider the case, and thereafter returned a verdict of guilty (Trans. p 5-6), and judgment was entered against plaintiff in error upon such verdict (Trans. p. 7).

SPECIFICATIONS OF ERROR.

I.

That the evidence in said cause is not sufficient as a matter of law to warrant the verdict of the jury or the judgment of the court against this defendant.

II.

That there is no substantial evidence in said cause upon which to base the verdict of the jury or the judgment of the court as to this defendant.

III.

The court erred in over-ruling defendant's objection to the testimony of the witness Berl Henderson given in rebuttal on the trial of said cause.

IV.

The court erred in denying defendant's motion to strike the testimony of the witness Henderson given in rebuttal on the trial of said cause.

V.

The court erred in giving to the jury that part of its instructions which is as follows, to-wit:

> "In respect to the law involved in this case, the famous Volstead Act, passed by Congress to carry out the provision for National Prohibition, it is a Constitutional amendment, and it is just as much a law as any other law upon our statutes. We all know that no law ever written is being violated or has been violated to a greater degree than the Volstead Law is now; but that is only the more reason why it must be enforced, as long as it is the law, with diligence and faithfulness, so that this tendency to violate this law may not, as it inevitably will if its violations are condoned or permitted to continue unpunished, tend to encourage the violation of other laws; because, when people discover that one law may be violated with impunity, that courts and juries are

impotent to enforce the law, there is a general tendency to transgress other laws, a failure to give due observance to law, and as a result, a breaking down of the morale. In other words, if a man may break the law and escape the consequences of his act, people say, 'What is the use? If one set of men can violate one law and escape, what is the use of the rest of us observing any law?' So it leads to the violation of other laws, and a breakdown of the morale of the people. Another thing in reference to this Volstead Act: People comment upon the fact that with many people it is not a popular law; many people are opposed to its spirit. They argue about this way,—that if they are drawn in the jury box in a case involving a prosecution for the violation of its provisions, they will return a verdict of acquittal; that they are against the spirit and operation of the law; that it is not right, so they will fail to enforce the law, and will permit the offender to escape. They argue to themselves further: 'If I am accused of a violation of this law it will only be necessary for me to swear to any sort of fictitious defense to give the jury a plausible excuse in order to secure my acquittal.'

"Gentlemen of the jury, that is a thing that wants to be suppressed as not well founded. I will say that in the Federal Court I have not found it to have any basis of truth, so far as

juries are concerned. Of cases that have come up in this Court, there have been as many convictions that were merited under this law, as in any other case. Why do I say this to you? Not to say that this defendant is to be convicted; not at all. I merely wish to impress upon you the seriousness of your duty in every one of these cases as in any other question that may be brought before you, and that you give to it the same serious, thoughtful and honest consideration; that you execute and carry out your duty, your obligation and your oath, whatever the verdict may be."

to which portion of said instructions the defendant made the following objections and exceptions, to-wit:

"MR. MURPHY If your honor please, the defendant desires to except to that portion of your honor's instructions in which you commented upon the Volstead law, and particularly that portion in which you state that that law is being violated more than any other law now is. Defendant further desires to except to your honor's comments on the Volstead Law to the effect that violations of it are breaking down the morale of the people and the general observance of law, and that there is a spirit not to enforce that law."

VI.

The court erred in over-ruling defendant's objection and exception to that portion of its charge to the

jury which is set forth at length in Specifications of Error numbered 5 herein.

VII.

The court erred in giving to the jury that part of its instructions which are as follows, to-wit:

> "Ask yourselves this: Whether Smith, who took them there and introduced Henderson and the others to the defendant in the first place, whether or not Smith was the agent of the defendant. Ask yourselves how these officers would find their way there if they were not taken there by someone who knew the liquor was there. Why did the defendant tolerate these men around there unless they were customers, whose patronage, at fifty cents a drink, was a profitable one."

to which portion of said instruction defendant made the following exceptions, to-wit:

> "We further except to that portion of your charge wherein you comment upon the fact and mention the fact that Vic Smith was the agent of the defendant, because I do not believe the same was warranted or justified by the evidence."

VIII.

The court erred in over-ruling defendant's exceptions and objections to that portion of its charge to the jury which is set forth in Specifications of Error numbered 7 herein.

IX.

The court erred in rendering and entering judgment herein for the reason that there is not sufficient evidence herein to justify or sustain said judgment.

X.

The court erred in rendering and entering the judgment herein for the reason that there is no evidence to justify or sustain the verdict of the jury.

XI.

The court erred in rendering and entering judgment herein for the reason that the verdict herein is contrary to law.

XII.

The court erred in rendering and entering judgment herein for the reason that the same is contrary to law.

XIII.

The court erred in rendering and entering judgment herein against defendant.

ARGUMENT.

Specifications of Error V and VI, as to error in instructions given and excepted to by plaintiff in error may properly be considered together.

Plaintiff in error submits that it was error for the trial court to so instruct the jury concerning the Volstead Act. A most careful reading of the record fails to disclose a scintilla of evidence before the court as to whether or not the Volstead Law was being violated to any degree more than any other law or that a failure to enforce the Volstead Law would break down the morale of the people, or that said law was not popular with many people, or many people were opposed to its spirit, or that any defendant or person considered he only had to swear to a fictitious defense to give the jury a plausible excuse to acquit.

Such a charge as the one herein complained of did not tend to aid the jury in arriving at a conclusion after a calm and dispassionate consideration of the case, but was what can more properly be designated as a defense of the National Prohibition Laws and a review of supposed difficulties of enforcement, and could not but have impressed the jury with the fact that the law had been flagrantly violated and its future efficacy depended upon convictions in that court. Thus placing this defendant not in the position of one charged with an offense but in a class of persons whose convictions must be had not so much because

of their violations of law, but in order to uphold that particular law in public esteem. In effect under such an instruction persons charged with violations of the National Prohibition Act were singled out and the jury urged to convict such malefactors because the court believed the law unpopular, and persons on trial for such alleged offenses were deemed to be sui generis.

If there was any evidence at all to justify such an instruction as the trial judge gave we would not complain, but it is as similar a case as one can be with that of Starr vs. U. S., 153 U. S. 614.

The Circuit Court of Appeals for the Ninth Circuit in the case of Dolan vs. United States, 123 Fed. Rep. at page 54, 55 held:

> "In 11 Encyc. Pl. & Pr. 128, it is said that 'it is error for the court, in instructing the jury to assume the existence of facts in support of which there is no evidence. This constitutes a direct perversion of the testimony upon which alone the jury are to render their verdict. The court, as well as the jury, is to consider only the testimony offered in court.'
>
> "See, also, the numerous authorities there cited, including Jones vs. Randolph, 104 U. S. 108, 26 L. Ed. 671; Davis vs. Patrick, 122 U. S. 138, 7 Sup. Ct. 1102, 30 L. Ed. 1090; People vs. Matthia, 135 Cal. 442, 448, 67 Pac. 694.

> "The giving of this instruction, in the light of all the circumstances disclosed by the record, was evidently prejudicial to the substantial rights of the defendant, and is of itself sufficient to authorize a new trial."

In the case just cited the instruction was not predicated upon any evidence before the court.

It is further contended that the charge above quoted given by the court to the jury was highly prejudicial for the reason that it was calculated to inspire the jury to bring in a verdict of guilty against the defendant in order that the Volstead Law should be upheld and without regard to the evidence against defendant. It was further calculated to so incite the minds of the jury that they would be constrained to return a verdict of guilty so that it would not be imputed that the Volstead Law was unpopular with them, or any of them. It urged upon the jury to uphold this law and enforce it so that the morale of the people would not be broken down and intimated that persons argue to themselves that a fictitious defense would give a jury an excuse to acquit. Although not saying that there was a fictitious defense in this case, still leaving an inference to be drawn by the jury that they could look upon this as a fictitious defense so generally set forth on the trial of cases for the violation of this law. All of this charge complained of was such as to interfere with the right and duty of the jury to exercise an independent judgment in the premises and

to arrive at a determination solely upon the facts in the case and this influence upon the minds of the jury was not corrected when the court instructed that it did not say the defendant was to be convicted.

We submit the whole charge cannot but be said to have a tendency to impress on the minds of the jurors that this was a fictitious defense to evade the penalties of the "famous Volstead Act" for the judge by innuendo and coment belittled the testimony of the defendant and his witnesses—for he refers to the sale of whiskey at fifty cents a drink as being a profitable trade (Trans. p. 12), and as to the witness Lizzie Drake he said her testimony should be viewed by the jury with care, and it was "a question for the jury to determine whether it is a case of the defendant (Willis) and this witness (Lizzie Drake) "you scratch my back and I'll scratch yours," merely because she thought Willis would subsequently be a witness for her (Trans. p. 25). Such comments by a judge are almost equal to evidence, in fact the respect and deference properly accorded to our courts makes the average juror very susceptible to the remarks of a judge and thus a defendant is prevented from having a determination of his case made upon the evidence. Without evidence of guilt no proper verdict of guilty can ever be reached in a case and suspicions in a case that a defendant is guilty does not justify a conviction. How much less then can suspicions of a trial judge that violators of the Volstead Act put up

fictitious defenses justify a jury in rendering a verdict of guilty.

In the case of Starr vs. United States, 153 U. S. page 614-626, the Supreme Court in passing upon the charge to a jury fully reviews the right of the trial judge in instructing the jury and in passing upon a charge given in that case the court says:

> "So the Supreme Court of Pennsylvania says: 'When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him; deductions and theories not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice." *Burke vs. Maxwell*, 81 Penn. St. 139, 153. See also 2 Thompson on Trials, Art. 2293, 2294, and cases cited.
>
> It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received

with deference, and may prove controlling. *Hicks vs. United States,* 150 U. S. 442, 452. The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances.

In addition to what has already been quoted, the following remarks, among others, were made:

"How unjust, how cruel, what a mockery, what a sham, what a bloody crime it would be upon the part of this government to send a man out into that Golgotha to officers, and command them in the solemn name of the President of the United States to execute these processes, and say to them, Men may defy you; men may arm themselves and hold you at bay; they may obstruct your progress; they may intimidate your execution of it; they may hinder you in making the arrest; they may delay you in doing it by threats of armed violence upon you, and yet I am unable as chief executive of this government to assure you that you have any protection whatever." * * * "What was this posse to do? What was he commanded to do? To go into the Indian country and hunt up Mr. Starr, and say to him

that on a certain day the judge of the Federal Court at Fort Smith will want your attendance at a little trial down there wherein you are charged with horse stealing, and you will be kind enough, sir, to put in your attendance on that day; and the judge sends his compliments to you, Mr. Starr. Is that his mission? Is that the message from this court that is to be handed to Mr. Starr upon a silver platter with all the formalities of polite society? Is that what Floyd Wilson was employed or engaged to do? No. This court did not have anything to do with that command; it does not go in the name of this court; it goes in the name of the chief executive officer, the President of the United States. What does he say, of course acting for the people?" * * * "Without these officers what is the use of this court? It takes men who are brave to uphold the law here. I say, because of this, and because there is no protection unless the law is upheld by men of this kind, if it be true that you are satisfied of the fact beyond a reasonable doubt that Floyd Wilson was a man of this kind, that he was properly in the execution of the high duty devolving upon him, and while so properly executing it by the light of these principles of the law I have given you, his life was taken by this defendant, your solemn duty would be to say that he is guilty of the crime of murder, because if the law has been violated it is to be vindicated; you

are to stand by the nation; you are to say to all the people that no man can trample upon the law wickedly, violently, and ruthlessly; that it must be upheld if it has been violated."

These expressions are qualified to some extent by other parts of the charge, which we cannot give at length, but we are constrained to express our disapprobation of this mode of instructing and advising a jury.

Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same everywhere, and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them."

We contend that in the case at bar that portion of the instructions heretofore quoted is objectionable and a new trial should be granted by reason of such instruction.

The case of Starr vs. United States has been cited with approval many times. See

Mullen vs. United States, 106 Fed. 895.
Nichols vs. United States, 106 Fed. 677.
Hickory vs. United States, 160 U. S. 408.
Al lison vs. United States, 160 U. S. 217.
Sparf vs. United States, 156 U. S. 50-179.

Foster vs. United States, 188 Fed. 305-308.
Ching vs. United States, 118 Fed. 542.
Mutual Life Ins. Co. vs. Logan, 87 Fed. 647.
U. F. Ins. Co. vs. Thomas, 82 Fed. 406-410.

In the case last cited, the same being a civil action, the Starr case, supra, was cited with approval and quoted, the Circuit Court of Appeals of the Seventh Circuit after commenting upon the instruction, saying:

> "It is sufficient to say upon the subject in general that every party in a court of justice is entitled to a fair and impartial trial of his cause, and that neither court nor counsel may rightfully use language in the presence and hearing of a jury which shall tend to excite passion or prejudice, or prevent calm, dispassionate consideration of the case. Reynolds vs. U. S. 98 U. S. 145, 168; Hicks vs. U. S. 150 U. S. 442, 452, 14 Sup. Ct. 144; Starr vs. U. S. 153 U. S. 614, 14 Sup. Ct. 919; Hickory vs. U. S. 160 U. S. 408, 425, 16 Sup. Ct. 327; Railway Co. vs. Meyers, 24 U. S. App. 295, 304, 11 C. C. A. 439, and 63 Fed. 793. The judgment is reversed, and the cause remanded, with directions to the court below to award a new trial."

In the case of Rudd vs. United States, 173 Fed. 912, the Starr case has been cited with approval, the court saying:

> "As Chief Justice Fuller said in Starr vs.

United States, 153 U. S. 614, 626, 14 Sup. Ct. 919, 38 L. Ed. 841, the influence of the trial judge on the jury is necessarily and properly of great weight, and his lightest word or intimation is received with deference and may be controlling. So positive and emphatic were the remarks of the court that it is not too much to say the jury may have believed a finding for the accused would have subjected them to ridicule. True, the court afterwards withdrew the language, and said that 'it does not follow that a man is a fool or insane who believes the representations,' and that it was a question for the jury; but it is doubtful the damage was repaired, and when that is the case the just remedy is a new trial. A mere withdrawal of words, and a direction to the jury that the question is for them, is not always sufficient. The effect of what was said may remain.

We do not mean to impair in any degree the right of a trial court in both civil and criminal cases to comment upon the facts, to express its opinion upon them, and to sum up the evidence, for that is one of the most valuable features of the practice in the courts of the United States. A Judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done. But his comments upon the facts should be judicial and dis-

passionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment."

And further, as to the question of the propriety of a trial judge giving to a jury an instruction that is coercive, for such is the effect of an instruction such as was given herein.

Peterson vs. United States (9 C. C. A.) 213 Fed. 920, 925.

See also: Johnson v. U.S. 270 Fed. 168

It is respectfully submitted that the jury by reason of the charge herein complained of were not left free to consider the facts in this case dispassionately and the defendant is entitled to a new trial.

I.

That portion of the charge embraced in Specifications of Error VII and VIII was also highly prejudicial, for it tells the jury to ask themselves if Smith was not an agent for Willis, that is an agent to stimulate the alleged business of selling liquor on the premises in question. The court intimating thereby that the business was so profitable that Willis had drummers out to secure trade, and if the jury believed that Smith was such an agent that could be considered against the defendant. Search the record as carefully as one may and one will find no word of testimony or intimation of any witness, not even hints that Smith was at

all connected with Willis. Nor was this error corrected by the court after the exception was taken to that part of the charge as the court still told the jury it could consider whether Smith was an agent for Willis, but he, the Court, didn't say Smith was (Trans. p. 121/128

That an instruction not based on the evidence in the case is erroneous is too elementary to need authorities cited in support thereof. The cases heretofore cited settle the question, especially

Starr vs. United States, 153 U. S. 614.

In conclusion we submit the judgment complained of should be reversed for the reasons above set forth.

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